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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1318

WESTERN UNION INTERNATIONAL, INC.,

Petitioner,

—against—

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, RCA GLOBAL COMMUNICATIONS, INC., ITT WORLD COMMUNICATIONS INC. and TRT TELECOMMUNICATIONS CORPORATION,

Respondents.

BRIEF OF RESPONDENT RCA GLOBAL COMMUNICATIONS, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RCA Global Communications, Inc. ("RCA Globcom"), a respondent herein, submits this brief in support of the petition by Western Union International, Inc. ("WUI") for a writ of certiorari to review a judgment and opinion of the United States Court of Appeals for the Second Circuit.

Opinions Below

The decisions below of the Court of Appeals and of the Respondent Federal Communications Commission ("FCC" or "the Commission") are, in our view, accurately described in WUI's petition and are reproduced in the appendices ("App.") to that volume.

The Court of Appeals' opinion of December 21, 1977 (App. 74a-90a), of which review is sought, now has been reported *sub nom. Western Union International, Inc.* v. *FCC,* 568 F.2d 1012 (2d Cir. 1977). The Commission's Reconsideration Order of October 25, 1977 (App. 14a-67a) also has now been published as 60 F.C.C.2d 517 (1977).

Jurisdiction

The judgment of the Court of Appeals was entered on December 21, 1977, and this Court has jurisdiction to review that judgment pursuant to 28 U.S.C. §§ 1254(1) and 2350(a) (1970).

The jurisdiction of the Court of Appeals to review the Orders in suit of the FCC was based on Communications Act § 402(a), 47 U.S.C. 402(a) (1970), and 28 U.S.C. §§ 2341-49 (1970 & Supp. V 1975).

Questions Presented

RCA Globcom endorses, and will not repeat, the two questions posed in WUI's petition. It wishes, however, to emphasize an element subsumed under the second of WUI's questions. It is this:

1. Whether the Commission could properly find, as the first step of its "discrimination" analysis, a "likeness" in the service supplied by AT&T to the international record

carriers and to AT&T's specialized domestic competitors when the Agency focused solely on supposed similarities in the technical attributes of the facilities provided and disregarded large differences in the purposes for which such facilities were used by the two classes of carriers and in the commercial circumstances in which they employed the facilities?

Statutes Involved

The relevant provisions of subchapter II of the Communications Act of 1934, relating to operations of communications common carriers, 47 U.S.C. §§ 201 *et seq.*, are set out in WUI's App. at pages 95a-100a. Of particular salience is Communications Act § 202(a), 47 U.S.C. § 202(a), which provides:

> "(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

Supplementary Statement of the Case

At issue in this case is a Commission finding of, and its prescription of a remedy for, an alleged "unjust or unreasonable discrimination," which Communications Act § 202(a) condemns as "unlawful". The Commission has said that such a discrimination existed, prior to its rulings in suit, in the provision by the American Telephone & Tele-

graph Company ("AT&T") of facilities to, on the one hand, various international record carriers ("IRCs"), including RCA Globcom and WUI, and to, on the other, certain domestic specialized carriers and domestic satellite carriers.

A proper finding of "unlawful" discrimination involves a two-step analysis—*first*, a determination that the services afforded the supplying carrier's two categories of customers are "like" and, *second*, a conclusion that any price differentials between the "like" facilities are unwarranted by differences in cost or other appropriate justification.

WUI's petition provides a compendious description, which we feel no need to repeat, of the proceedings which eventuated in the challenged decisions of the Commission and the Court of Appeals. This presentation shows, *inter alia*, that the Commission's conclusion of "unlawful" discrimination was invalid because it improperly addressed the matter of cost justification for differences in AT&T's facilities prices to the IRCs and to the domestic carriers.

We would add only a few additional comments about the carriers and facilities involved. These support, we submit, our related claim that the first step of the Commission's "discrimination" analysis—its determination of "likeness" —also was improper. We also remark upon the adverse effects, both current and foreseeable, which the Commission's casual "likeness" determination has had and will have upon the international communications services available to the American people.

A. Carriers and Facilities Involved

The country's three principal IRCs, RCA Globcom, WUI and ITT World Communications Inc. ("ITT Worldcom"), and another such carrier, TRT Telecommunications Corporation ("TRT"), appeared below. Each has been in business, directly or through predecessor companies, for over 60 years.* In the early days of telecommunications they supplied, by cable or radio, the country's overseas telegraph services. In current practice they offer, between the continental United States and overseas points, a full range of record services (*e.g.*, telegrams, telex, facsimile, data, television and radio program transmission) and private lines for alternate voice-data ("AVD") use.** (App. 77a)

The IRCs' services, while competitive with each other, have developed, in a complementary fashion, with the overseas services of AT&T, with which they do not, in general, directly compete. AT&T is, not only the principal element of the nation's domestic telecommunications enterprise, but also the country's supplier of overseas telephone service and of private lines to overseas points for voice use.***

In the period of rapid technological advance since the Second World War, the IRCs and AT&T have participated jointly in the planning and financing of, and concurrently use, the principal instrumentalities of overseas communications. These are the submarine cables connecting the

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* *See* the historical data in *Western Union Tel. Co.*, 25 F.C.C. 35, 39-42 (1958), *vacated on other grounds*, 267 F.2d 715 (2d Cir. 1959).

** In 1975, the latest year for which industry-wide statistics are readily available, the IRCs handled 14,340,000 overseas telegrams, 43,600,000 overseas telex calls, and supplied private-line and other advanced record communications services to a broad spectrum of government and business users. *See FCC, Statistics of Communications Common Carriers, Year Ended December 31, 1975*, at 30, 158, 162, 165 (1977).

*** RCA Globcom, WUI, ITT Worldcom, and AT&T participate alternately, a week at a time, but pursuant to a joint tariff, in the provision of the country's overseas television program transmission service. (App. 44a)

United States to Europe, the Far East, points in Central and South America and the Caribbean area, and the American earth stations of the INTELSAT system of international communications satellites.

Directly at issue in this proceeding are the so-called "tail circuits" or "entrance facilities" which constitute essential connections between the IRC operating centers in the limited number of "gateway" cities where the IRCs are permitted to operate (currently New York, Washington, San Francisco, Miami and New Orleans) and the cable landing sites and the satellite earth stations.* This circuitry, though physically located within the country's borders, is an integral part of international communications service and is used exclusively for such service.

Historically, AT&T has leased the "tail circuits" to each of the IRCs, at what AT&T has represented to be its cost, pursuant to contracts which are similar among the IRCs. (App. 7a, 78a) These circuits connect a handful of well-defined points and are derived from trunk facilities which in many cases were specially constructed for this purpose and which also are employed by AT&T for its own international services. Thus, "tail circuits" tie the international carriers' message centers into the jointly used cables and earth stations. They do not extend to the premises of any customer.**

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* The cable landing sites (*e.g.*, Greenhill, Rhode Island and San Luis Obispo, California) and INTELSAT earth stations (at, *e.g.*, Andover, Maine and Brewster Flat, Washington) are remote from the IRCs' few metropolitan "gateways". They were sited in the light of the needs and convenience of the entire international service, AT&T's, as well as the IRCs', and of the contractual availability to the IRCs of "tail circuitry" into the "gateways". The IRCs have no realistic alternative to the "tail circuitry" supplied by AT&T.

** By reason of the IRC's limitation to the five "gateway" cities "through" record services between domestic and overseas locations conventionally are provided to customers by interconnection, at an IRC's message center, of the latter's overseas circuitry and the facilities of a domestic carrier, usually AT&T or a Bell System affiliate, needed to complete the connection to the domestic customer's premises. Facilities "inland" of an IRC's message center required to reach particular customers are taken pursuant to the applicable tariff of the domestic carrier concerned, and they are not in issue here.

The Commission's determination of "discrimination", which the IRCs challenge, involves a "comparison" of the aforesaid facilities supplied by AT&T to the IRCs and the facilities which, in recent years, AT&T has made available to a new category of specialized domestic carriers and domestic satellite carriers. The Commission authorized the first such carrier in 1969 (to operate between Chicago and St. Louis), *see Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969). Thus its license post-dates the most recent of the series of contracts by which AT&T, over decades, had supplied the IRCs.

The new domestic carriers are direct competitors of AT&T, whose entry and expansion AT&T has vigorously resisted.* Such carriers primarily offer private-line channels to large-volume communicators in competition with the domestic private-line services of AT&T.** They normally own and operate either domestic satellites (instruments distinct from those employed in the INTELSAT system used by AT&T and the IRCs for their overseas service) or microwave trunks which link operating centers in major cities in various parts of the country. Unlike the IRCs, they are able to locate their earth stations and other facilities at sites of their own choosing. The domestic carriers'

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* *See, e.g., Bell System Tariff Offerings*, 46 F.C.C.2d 413, 435 *enforced sub nom. Bell Tel. Co.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

** *See MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977).

ownership of their own long-distance facilities is a principal condition of their claimed capacity to offer private-line services differently from, or more cheaply than, AT&T.

The Commission made no record below of what facilities the domestic carriers actually seek and obtain from AT&T (and its affiliated Bell System operating companies). While AT&T, pursuant to prior Commission order, tariffs a broad range of facilities which it will make available to domestic carriers,* the reported cases indicate that the latter largely seek (and get) from the telephone carriers, not the full menu, but local loops and other short-haul facilities required to link their own trunks and message centers with the premises of individual subscribers to their private-line services.**

AT&T's present rates to the domestic carriers are the product of a Settlement Agreement which AT&T and several of the domestic carriers negotiated in 1975, and which the FCC accepted, to conclude a Commission rate investigation known as Docket No. 20099. *See American Tel. & Tel. Co.*, 52 F.C.C.2d 727 (1975). The agreement which AT&T and the domestic carriers reached to end that dispute explicitly noted that AT&T would continue, thereafter, to supply tail circuits to the IRCs pursuant to contract at rates different from (and lower than) those in the agreed domestic tariffs. (*Id.* at 735)

The Commission's finding that the facilities which AT&T afforded the IRCs and the domestic carriers were "like" is based, in its initial Decision and Order of March 23, 1977, 63 F.C.C.2d 761 (1977) (App. 5a-13a), on little more than the assertion that they are "the same kind of facilities" (63 F.C.C.2d at 762) (App. 6a). In its further Order

* *See Bell System Tariff Offerings, supra,* 46 F.C.C.2d at 438.

** *See California* v. *FCC,* 567 F.2d 84 (D.C. Cir. 1977), *cert. denied,* 98 S.Ct. 721 (1978).

on reconsideration, released on October 25, 1977 (App. 14a-67a), the Commission elaborated to note that:

> "[I]t was evident from a reading of [AT&T's domestic facility] tariffs and [the tail circuit] contracts that the contract facilities ("voice-grade circuits'[*] in the terms of the contract) served the same communications function for the IRCs as the tariff facilities ('voice grade facilities' in the tariff language) did for the DSCCs and SCCs [domestic satellite and specialized common carriers] . . . . Despite this functional similarity the contracts provided preferential rate treatment to the IRCs. . . ." (App. 16a) (citations omitted)

With this it viewed its burden of showing "likeness" as met. Everything else could be disregarded.

B. The Harsh Effects on the Overseas Service

AT&T (and its Bell System affiliates) complied with the Commission's initial Decision in this Docket by cancelling their long-standing contractual arrangements with the IRCs and by issuing, with respect to them, tariffs virtually identical to those covering the telephone carriers' provisions of facilities to their domestic competitors. (App. 22a).**

* The term "voice-grade circuit" refers to the bandwidth of about 3-4 kilohertz normally employed in the transmission of a voice conversation. Such bandwidths can be, and conventionally are, broken down into "telegraph grade" channels for many record uses. They also can be aggregated into larger packages for other communication uses.

** Under the Commission rulings in suit, the agreed arrangement between the domestic carriers and AT&T in Docket 20099 serves as the model for the tariff which AT&T (and its Bell system affiliates) now have imposed on the IRCs. The tariffs to which AT&T and the domestics agreed in Docket 20099 were, in turn,

This has had an immediate, and harsh, effect on the costs to be borne by the IRCs and, ultimately, their customers. AT&T's new tariffs expose each of the IRCs to overall rate increases of more than 100%, aggregating for the four carriers as a group some $5,000,000 per year.* This increase, unrequested by AT&T or anyone else, but effectively mandated by the Commission, will not be offset by any rate decrease to anyone.

The adverse effects of the Commission's decision extend, however, far beyond their immediate pocket-book impact, substantial as that is in terms of the IRC's overall operations. The Commission, in making its comparative appraisal of the facilities which AT&T affords the IRCs and the telephone carriers' domestic competitors searched for and was satisfied, it seems, by any common denominator. In finding "likeness" it focused *entirely* on narrow technical parameters ("voice-grade circuits" and their "functional" use to carry communications) which can be applied to almost any circuitry. It disregarded vast differences in the commercial circumstances of the two categories of carriers which lease circuitry from AT&T and in their needs and purposes in doing so.

Thus, the Agency's decision impels AT&T to a presumption that the two classes of carrier customers should

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patterned on the tariffs of AT&T (and its Bell system affiliates) applicable to their own private-line customers, except that the domestic carriers' tariffs provide a substantial (30%) discount for short-haul circuits (App. 46a-47a, 61a-62a). The Commission has insisted on applying to the IRCs, the domestic carriers' model even though the negotiations in Docket 20099, by excluding the IRCs, had excluded from the bargaining, the carriers primarily interested in the long-haul rates which affect the IRCs.

* This amount, for only a small, albeit integral and vital, portion of the facilities employed by the four IRC's compares to their total system revenues in 1975 of approximately $273,000,000. *See FCC, Statistics of Communications Common Carriers, Year Ended December 31, 1975,* at 30, 158, 162, 165 (1977).

be treated identically in almost all circumstances. The Commission does so even though specialized domestic carriers are AT&T's competitors, which AT&T has no incentive to encourage, while, in the overseas arena, AT&T and the IRCs provide to the public complementary services which have benefitted, and would continue to benefit, from the joint and flexible use of the necessarily limited, and expensive, facilities needed for intercontinental transmission.

The consequences of this Commission-imposed policy of "equivalence" are evident from an examination of the "tail circuit" tariffs filed by AT&T in response to the Commission Orders in suit. They deprive the IRCs of service options, valuable to users of the overseas service, which they enjoyed under the prior contractual mode, but which AT&T appears unwilling to offer its domestic rivals and thus will no longer supply the IRCs. For example:

(1) Under the tariffs which AT&T applies to the domestic carriers and the "conforming" tariffs which it has been required to apply to the IRCs, there is, for any circuit, a minimum charge of at least a month's rentals; under the IRCs' contracts with AT&T, circuits could be taken for a minimum charge of 1/10 of a month's rental in accordance with normal international practices throughout the world. The short-term rentals are important to the news media for covering international news and sporting events—for example, President Carter's recent trip to South America and Africa. (App. 55a, 61a)

(2) The IRCs no longer have access, under the new tariffs covering their "tail circuitry", to "groups" and "supergroups"—bundles of circuits that can be aggregated for simultaneous, coordinated use. Such aggregation is vital if the IRCs are to meet the growing need for high-

speed, high-volume data transmission between computers and data banks on different continents. (App. 49a, 54a, 60a)

(3) Quality control procedures and guarantees, which the IRCs received with their circuits under the contracts, are not similarly available under the replacement tariffs, thus requiring other arrangements if the transmission standards appropriate to intercontinental communications are to be retained. It is not clear that alternative arrangements can feasibly be obtained. (App. 38a-39a, 60a)

The problems posed by the Commission's imposition of patterns developed in the domestic arena upon the quite different circumstances of international communications do not end there. Already, AT&T and RCA Globcom are at odds before the Commission over the telephone carrier's efforts to impose "domestic" conditions on facilities which it supplies to the IRCs in New York and San Francisco in order that the latter may implement their role in the overseas carriers' joint provision of television transmission service. At every turn the IRCs' access to facilities available from AT&T will be measured, not by the needs and uses of the complementary overseas voice and record services, but by the imperatives of the telephone carrier's competitive posture *vis a vis* domestic carriers.

Reasons For Granting The Writ

WUI's petition sets forth several persuasive reasons for granting the writ of certiorari which its petition seeks. The preceding discussion of the "likeness" component of the Commission's "discrimination" finding establishes, we submit, another.

In reaching its conclusion that the facilities which AT&T afforded the IRCs and the domestic carriers were "like"

the Agency relied on only two things—the fact that the IRCs' contracts and the domestic tariffs refer to the transmission paths they cover in terms of a unit of bandwidth known as the "voice grade circuit" and the claim, not further explained, that the circuitry afforded the two groups of carriers are "functionally equivalent". Given the inadequacy of the record which the Commission permitted the parties to make, the Commission had no more.

Whether an Agency, in making a finding of "unlawful discrimination" can proceed on so little—whether it can disregard, not only the differences in costs related in WUI's submission, but also the different purposes for which the two groups of carriers use their circuits, the different kinds of traffic they carry, the differences in density and length of their route patterns, the dissimilarity in the nature of the businesses of the domestic carriers and the IRCs, the distinct manners and circumstances in which the circuits serving the two carriers were engineered and constructed, and other points of difference between the domestic carriers and the IRCs—raises a profound issue for all of the country's regulated industries which, like common carrier communications, are subject to statutory nondiscrimination requirements and to tariff regimes.

The Commission's ruling, which the Court of Appeals has endorsed, is unwarranted by the one reported judicial decision construing the Communications Act in this context, *see American Trucking Ass'ns* v. *FCC*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967), *affirming American Tel. & Tel. Co.*, 38 F.C.C. 370, 377-78 (1964), and 37 F.C.C. 1111, 1113 (1964), and by extensive practice under the Interstate Commerce Act, upon which the Communications Act is patterned, *see Atchison, T. & S.F. Ry.* v. *Witchita Board of Trade*, 412 U.S. 800, 812-13 (1973),

L.T. Barringer & Co. v. *United States,* 319 U.S. 1, 6, 9 (1943), *United States* v. *Illinois Cent. R.R.,* 263 U.S. 515, 524 (1924); *Texas & P. Ry.* v. *ICC,* 162 U.S. 197, 219-20 (1896).

These cases recognize that a valid finding of unlawful discrimination depends, not upon the mechanical application of a simplistic formula, but upon a detailed appraisal of a wide range of relevant facts. As this Court wrote in *Texas & P. Ry.* v. *ICC, supra:*

> "The very terms of the statute, that charges must be *reasonable,* that discrimination must not be *unjust,* and that preference or advantage to any particular person, firm, corporation or locality must not be *undue* or *unreasonable,* necessarily imply that strict uniformity is not to be enforced, but that *all circumstances and conditions* which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, *should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.*" (162 U.S. at 219) (emphasis supplied in part)

Only such an approach can reconcile, in a socially useful way, the statutory directive that a regulated carrier not unjustly discriminate and the entrepreneurial imperative which has its role to play even in a regulated industry. A carrier should have the opportunity to apply a reasonable discretion in shaping its response to the almost infinite variety of a vast, vital and free economy.

The simplistic tests of "likeness" and "discrimination" which the Commission has promulgated in this case should not become the law of the Communications Act and, by potential extension, of the analogous statutes regulating other important industries. Certainly it should not become

the law without review and consideration by this Court.

This is not a situation in which the nation can afford the luxury of time and many lower-level cases to "work out" a "correct" solution. The communications industry is living, today, through a period of extraordinarily rapid technological advance. Current decisions will fix industry structure for years, even decades, to come. Are these decisions to be made, as the Communicaitons Act seems to require, by an Agency thinking carefully about the vast powers it exercises? Or are they to be made by officials free to substitute *a priori* conclusions for the hard work of factual analysis and judgment? The guidance of this Court is needed.

Conclusion

The writ of certiorari requested should issue.

Respectfully submitted,

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